

NO. 11-0620

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94997

STATE OF OHIO,

Plaintiff-Appellant

-vs-

ANTHONY FEARS,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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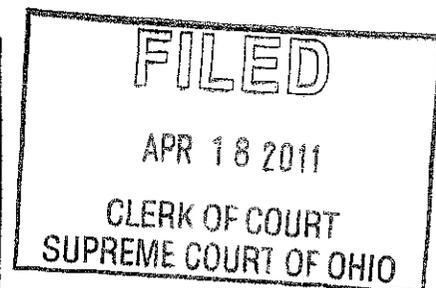
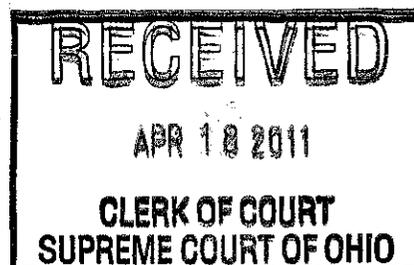


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State v. Fears, Cuyahoga App. No. 94997, 2011-Ohio-930

I. EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND/OR ISSUE OF GREAT PUBLIC INTEREST

Appellee Anthony Fears was pulled over by Cleveland Police officers near the intersection of E.120th and Sellers Ave. The officers believed that Fears committed a change of course infraction in violation of Cleveland Codified Ordinance 431.14. After the stop, crack cocaine was found on him. He was indicted for drug violations. The trial court denied his motion to suppress evidence, finding that the police had a good faith basis to effect the traffic stop.

On Appeal, the Eight District held that even though the officers acted in good faith and their actions were based on an objectively reasonable interpretation of the law, the officers' mistake of law required suppression of the evidence. However, the purpose of exclusionary rule is to deter unlawful police conduct. Its application is unnecessary in this case as the police acted in good faith on an honest belief that they had witnessed a traffic violation. Because of this, the State contends where there is an absence of police misconduct, the application of the exclusionary fails to have any deterrent effect. As such, the exclusionary rule should not be applied.

Officers Robert Sauterer and Robert Taylor of Cleveland Police Department were patrolling the area of East 117th and Sellers Ave. Officers first noticed Appellee Anthony Fears stopped at the intersection of Dundee and Sellers. Fears was facing southbound on Dundee and proceeded to make a left turn onto Sellers. The officers, who were stopped on the other side of the intersection turned behind Fears. Immediately after turning onto Sellers, Fears turned on his left turn signal and continued to drive Eastbound on Sellers, driving through the next intersection, E. 118th and Sellers. With his turn signal still on, Fear eventually turned left onto E.120th. After he turned, officers

pulled him over for what they reasonably believed to be a change of course violation. During the traffic stop, police believed that Fears possibly had an outstanding warrant. After alerting him of this, officers conducted a pat-down search for their own safety and found one rock of crack cocaine hidden near Fears' left ankle.

Fears filed a motion to suppress evidence, challenging the legality of his stop. He claimed that because the officers lacked the reasonable suspicion necessary to stop him, the drugs found on his person should be suppressed. The trial court denied the motion, finding that the officers had a reasonable belief that they had witnessed a traffic infraction, which justified the stop. Fears entered no contest pleas on counts of drug possession and possession of criminal tools. On appeal, the Eighth District reversed the trial court's decision to deny the motion to suppress, finding that the officer's mistake of law, even if made in good faith and based on a reasonable belief, meant that the officers lacked a reasonable articulable suspicion for the stop. Cuyahoga County courts now hold that evidence obtained in good faith and based on an objectively reasonable, albeit, mistaken interpretation of the law must be suppressed.

Further, the appellate opinion seriously impedes on an officer's ability to evaluate and perceive potential criminal activity as it is occurring. In short, the courts in Cuyahoga County are now to apply the exclusionary rule to cases where there is no actual police misconduct. Because the Eighth District has created a rule of law that prohibits police conduct that is constitutionally valid, the State asks this court to accept jurisdiction, reverse the appellate decision and hold as law the State's following Proposition of Law:

Proposition of Law I:

When police act in good faith based on an objectively reasonable, yet mistaken interpretation of a criminal statute, when conducting a traffic stop, evidence obtained from a subsequent search should not be suppressed.

II. STATEMENT OF THE CASE

Anthony M. Fears was indicted for one count of Drug Possession, a violation of R.C. 2925.11(A), and one Count of Possessing Criminal Tools, a violation of R.C. 2923.24(A). The trial court denied his motion to suppress and he entered pleas of no contest to the indictment. The Eighth District Court of Appeals reversed the court's decision to deny the motion to suppress in *State v. Fears*, Cuyahoga App. No. 94997, 2011-Ohio-930.

III. STATEMENT OF THE FACTS

Cleveland Police Officers Robert Sauterer and Robert Taylor were on duty patrolling the area of Sellers Avenue and Dundee Drive, in Cleveland Ohio. They first saw Anthony Fears driving southbound on Dundee and Sellers Avenue. After Fears turned onto Sellers he immediately turned on his left signal and then drove past East 118th Street, the next street, without turning. He had his turn signal continuously through the intersection before he eventually turned left at the next intersection, East 120th Street.

The officers then conducted a traffic stop of Fears, as they believed they witnessed Fears violating Section 431.14 of the City of Cleveland Codified Ordinances, an ordinance relating to the use of a turn signal, or the change of course section. The officers ran Fears' name in the police computer system and his name came up as having an outstanding warrant for arrest. At this time, the officers patted Fears down from

weapons. During the procedure, Officer Sauterer asked Fears if he had anything in his shoes and he stated, "if you want, go ahead and look." Officer Sauterer felt around the top of Fear's shoe and located crack cocaine between his shoe and his sock. Fears was then placed under arrest for possession of drugs. The officers also issued a citation to Fears for a violation of Section 431.14, Change of Course Violation, and of the Cleveland Codified Ordinance.

After hearing testimony regarding the stop from both officers involved, the trial court denied the motion to suppress. It stated that, "[O]n the basis of the testimony the officers had a reasonable belief that a traffic violation was occurring; that traffic violation being change of course with a – with the turn signal being activated well in advance of the street at which the Defendant was making a turn." The court then detailed the subsequent events and found that the search resulting in the discovery of crack cocaine was lawful. However, on appeal, the Eighth District Court of Appeals opinion stated that any good faith mistake of law on the part of the officers' was immaterial; it determined that a mistake of law regarding the use of a turn signal meant that the traffic stop was not justified. *Fears*, 2011-Ohio-920, at ¶ 13.

IV. LAW AND ARGUMENT

Proposition of Law:

When police act in good faith based on an objectively reasonable, yet mistaken interpretation of a criminal statute, when conducting a traffic stop, evidence obtained from a subsequent search should not be suppressed.

A. The Fourth Amendment Does Not Require Application of the Exclusionary Rule Where Police Act in Good Faith in Conducting a Traffic Stop

Courts have long applied the remedy of suppressing evidence in cases where a constitutional violation has occurred. The original purpose of excluding evidence has been said to rest on two principles; that police must obey the law when enforcing it and the government should not benefit from illegal acts of its agents. *Ohio Arrest, Search and Seizure* (2009) Katz, Lewis, 684, section 27:1. However, the United States Supreme Court has refined its analysis and found that the exclusionary rule is to be applied only to deter police misconduct; with its decisions being “powered by the belief that the only reason to exclude evidence is to deter illegal police behavior.” *Id.*, 697, section 27:4.

The Supreme Court has long held that good faith on the part of police will excuse evidence seized upon searches made without a warrant. See, e.g., *U.S. v Leon*, 468 U.S. 897, 104 S.Ct. 3405. Recently, that good faith exception to the application of the exclusionary rule was extended to mistakes made by police. In *Herring v. U.S.* (2009), 555 U.S. 135, 129 S.Ct. 695, 698, 172 L.Ed.2d 496, the Supreme Court premised its decision to not apply the exclusionary rule to a mistake by police by stating, “Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” Further, the Court

explained that exclusion of evidence is a remedy of last resort – not first. “Indeed, exclusion ‘has always been our last resort, not our first impulse,’ *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), and our precedents establish important principles that constrain application of the exclusionary rule.” *Id.*, 129 S.Ct. 695, 700.

With the application of the exclusionary rule to be used as a last resort in order to constrain and deter police misconduct, there is no justification for its application in this case. The trial court did not find misconduct or malevolent intent on the part of the officers. Instead, it found that the officers had a reasonable belief that they witnessed Fears commit a traffic violation. Such belief should not lead to suppression of evidence as was found necessary by the appellate court. The suppression of evidence in this matter simply does not deter illegal police misconduct.

A police officer’s conduct that is based upon an objective, reasonable interpretation of law should not lead to the suppression of evidence. In the federal court system, the Eighth Circuit has adopted this position. It has stated, “the validity of a stop depends on whether the officer’s actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one.” *United States v. Martin*, 411 F.3d 988, 1001, (8th Cir. 2005) (Citing, *United States v. Smart*, 393 F.3d 767, 770 (8th Cir.2005)). In *Martin*, the court affirmed the denial of a motion to suppress based on an officer’s objectively reasonable belief that operating a motor vehicle with one non-functioning brake light violated a particular provision of tribal law. The court concluded that a misunderstanding of traffic laws, if reasonable, need not invalidate a stop made on that basis. *Martin* 411 F.3d at 1002.

This recognition that the exclusionary rule is to be limited to a deterrent effect has been applied in the Southern District of Ohio. In *United States v. Washabaugh*, 2008 WL 203012, (8th Cir. 2008), the Court, relying on *Martin*, succinctly stated, "There is no good reason to require a traffic officer to have guessed correctly in advance whether a judge will later find the officer's interpretation to have been correct, at least when we are trying to regulate what is done with evidence discovered as a result of the stop, rather the primary conduct of the purposed offender. It is enough to require the officer's interpretation [of law] to have been objectively reasonable."

In this case, the officers were reasonable in their actions. They had a reasonable basis to believe that they had witnessed Fears commit a traffic violation. Because of this, the appellate court's reversal of the trial court and its application of the exclusionary rule is not justified.

B. Ohio Courts have Not Applied the Exclusionary Rule to Evidence Found after Police Have Effectuated a Traffic Stop Based on Reasonable Suspicion a Traffic Violation Occurred

Although Ohio courts have not directly found that there exists a good faith exception to the exclusionary rule where officers have committed a mistake of courts in Ohio have recognized that the standard for assessing police conduct is not based upon the legal determination made later by a court of law, but based upon the officer's beliefs at the time a traffic stop was made. According to the court in *State v. Melone*, "it is well-established that an officer's observance of a traffic violation furnishes probable cause to stop a vehicle." Lake App. No. 2009-L-047, 2009-Ohio-6710, at ¶ 26. More important to the decision whether or not in determining whether or not to apply the exclusionary rule, "if no actual violation is observed, an officer may initiate a constitutionally valid traffic stop if she has reasonable suspicion, based on specific and articulable facts that a

traffic law is being or has been violated.” *Id.*, (Citing, *Berkemer v. McGarty*, 468 U.S. 420, 439, 104, S.Ct. 3138, 82 L.E.2d 317 (1984).)

Courts have long held that an officer must point to a particularized and objective basis for suspecting a motorist of a violation, and the stop will be upheld even if a true infraction did not occur. *Id.*, (Citing, *State v. Andrews*, 57 Ohio St.3d 86, 87, 565, N.E.2d 1271 (1991). At least one appellate court has stated that, “[U]nder limited circumstances, the exclusionary rule may be avoided with respect to evidence obtained in an investigative stop based on conduct that a police officer reasonably, but mistakenly, believes is a violation of the law.” *State v. Brown*, Madison App. No. CA2001-03-008, 2002-Ohio-1017. In Ohio, courts have recognized that the drastic effect of excluding evidence based upon an officer’s mistake of law is not necessary. However, in Cuyahoga County, such recognition has not been made.

C. The Decision in this Case That Suppresses Evidence is an Unreasonable Application of the Exclusionary Rule

The Cleveland Police Officers believed that they witnessed Fears violate Section 431.14 of the City of Cleveland Codified Ordinances. That section reads:

431.14 Signals Before Changing Course, Turning or Stopping

No person shall turn a vehicle or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety, nor without giving an appropriate signal in the manner hereinafter provided.

When required, a signal of intention to turn or move right or left shall be given *continuously during not less than the last 100 feet traveled by the vehicle before turning.*

(Emphasis added.)

The trial court found that the officers had a reasonable basis to believe they witnessed Fears violate a traffic ordinance and thus the stop that led to the discovery of Fears' crack cocaine did not require the suppression of evidence. When looking at the language used within the Cleveland ordinance, there is a clear explanation as to the officers belief that Fears committed a traffic violation. Even though the ordinance does not provide any language stating how long a turn signal may be on prior to turning, the statute does include the language that when read, leads to a reasonable interpretation that a prolonged use of a turn indicator violates the change of course requirements.

The pertinent language in the ordinance that explains the officers' belief that Fears violated the law reads, "a signal of intention to turn or move right or left shall be given *continuously during not less* than the last 100 feet traveled by the vehicle before turning." *Id.*, (Emphasis added.) The language "continuously during not less..." is of importance. Because the word "during" is not specifically defined within the Cleveland Codified Ordinances, it would be reasonable for an officer to believe that when a motorist activates a turning signal, the vehicle is to be turned concurrently with that act of signaling.

Fears activated his turn signal, then passed E. 118th Street and did not turn; instead, he continued driving to the next intersection. The officers reasonably believed that Fears violated the change of course ordinance. Upon analysis, he did not. But the later determination and interpretation of law should not be used as a basis to exclude evidence. In this case, the trial court found, "the officers had a reasonable belief that a traffic violation was occurring." Based on the language of the statute and that finding of fact by the trial court, the officers actions were based an objectively reasonable mistake of law. The appellate court's later reversal and suppression of evidence in this case was

thus an unnecessary application of the exclusionary rule. It serves no purpose of deterrence; especially where the officers' mistaken interpretation of the ordinance was reasonable.

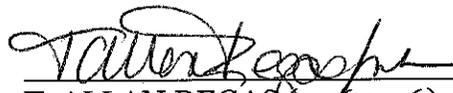
V. CONCLUSION

The State asks that this Court accept jurisdiction of this matter. The application of the exclusionary rule in instances where police act in good faith upon their belief they witnessed a traffic violation occurring serves no legitimate purpose, there is no misconduct that is to be deterred. For these reasons, the State asks that this Court accept jurisdiction of this case, adopt its Proposition of Law, and reverse the decision of the appellate court applying the exclusionary rule where there is no deterrent effect.

Respectfully submitted,

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A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 15th day of April, 2011, to Nathaniel McDonald, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.



Assistant Prosecuting Attorney

[Cite as *State v. Fears*, 2011-Ohio-930.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94997

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY FEARS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525172

BEFORE: Stewart, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 3, 2011

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Anthony Fears, appeals from his conviction on counts of drug possession and possession of criminal tools, arguing that the court erred by denying his motion to suppress evidence of drugs seized during a traffic stop based on his failure to turn while his turn signal was activated. His primary argument is that the court erred by finding that the police could effectuate a traffic stop based only on a reasonable, articulable

suspicion of criminal activity — he maintains that to justify a traffic stop the police must satisfy the higher standard of probable cause to arrest.

{¶ 2} The facts are not disputed for purposes of appeal. Police officers on routine patrol saw a car driven by Fears make a left turn. After completing the turn, Fears activated his left turn signal. He drove through the next intersection with his turn signal activated, but did not turn. He then turned left at the second intersection he approached. The police stopped Fears because they believed that he had violated Cleveland Codified Ordinances 431.14 relating to signaling before changing course. Computer records indicated that Fears had a “possible” outstanding warrant, so the officers alerted him of this fact. They ordered him out of the car and conducted a pat-down search for their own safety. They found no weapons. Concerned that he might be concealing a weapon in his shoes, they asked Fears if he had anything in his shoes. Fears replied, “[i]f you want, go ahead and look.” The officers found a single rock of crack cocaine near Fears’s left ankle.

{¶ 3} The court found that the officers had a reasonable belief that they had witnessed a traffic infraction, so they were justified in making the traffic stop. It also found that information showing that there was a “possible” outstanding warrant against Fears justified that pat-down search for officer safety. Finally, the court found that the officers were permitted to ask Fears

if he possessed any contraband or weapons, and that Fears voluntarily consented to a search of his shoes.

I

{¶ 4} Fears’s first argument is that the court incorrectly applied the “reasonable, articulable suspicion” standard to justify the traffic stop. Acknowledging that Ohio courts are bound by Ohio Supreme Court precedent applying that same standard, Fears nonetheless argues that Ohio courts should apply the more stringent “probable cause” standard to determine whether a traffic stop is justified.

{¶ 5} “Reasonable, articulable suspicion” is a “less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.” *Illinois v. Wardlow* (2000), 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570. As Fears concedes, in *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, the Supreme Court of Ohio held that “if an officer’s decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid.” *Id.* at ¶8. *Mays* is a decision by a superior court that we are bound to follow — we have no authority to deviate from it. It follows that the court did not err by applying the reasonable suspicion standard when reviewing the propriety of the traffic stop.

{¶ 6} Even if we had authority to consider whether *Mays* is good law, we remain unconvinced that the probable cause standard should apply to traffic stops.

{¶ 7} Traffic stops are considered “seizures” for purposes of the Fourth Amendment, *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660, and the “reasonable, articulable suspicion” standard set forth in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889, has for many years been accepted as the standard governing traffic stops. See, e.g., *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 884, 95 S.Ct. 2574, 45 L.Ed.2d 607 (“officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”); *United States v. Cortez* (1981), 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621. In fact, the reasonable, articulable suspicion standard requires only a “minimal level of objective justification” to justify a *Terry* stop. *United States v. Sokolow* (1989), 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1.

{¶ 8} Fears argues that the United States Supreme Court changed the standard to “probable cause” in *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89, when it stated: “As a general matter, the decision to stop an automobile is reasonable where the police have

probable cause to believe that a traffic violation has occurred.” *Id.* at 810. This one-off statement has been described as “dicta,” *United States v. Delfin-Colina* (C.A.3, 2006), 464 F.3d 392, 396, and, in any event, the Court has since used the “reasonable, articulable suspicion” standard when referencing the validity of traffic stops. See *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740. It is highly unlikely that *Whren* intended to change the standard for reviewing traffic stops when it engaged in no specific analysis on that point of law, and its subsequent reversion to the reasonable, articulable suspicion standard reinforces that conclusion. *United States v. Lopez-Soto* (C.A.9, 2000), 205 F.3d 1101, 1104-1105. We thus find no basis for imposing the more stringent probable cause standard to justify traffic stops.

II

{¶ 9} The state concedes that Fears’s conduct did not constitute a violation of Cleveland Codified Ordinances 431.14,¹ but argues that the police

¹Cleveland Codified Ordinances 431.14, states in relevant part:

“No person shall turn a vehicle or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety, nor without giving an appropriate signal in the manner hereinafter provided.

“When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.”

It is apparent that the ordinance only penalizes a driver who turns without giving an

did not learn of their mistake until after the arrest had been made so they were acting with a good faith belief that they had witnessed a traffic infraction. Fears maintains that the good faith exception cannot apply because the state failed to raise it below and the good faith exception does not apply to mistakes of law.

{¶ 10} In *United States v. Miller* (C.A.5, 1998), 146 F.3d 274, the United States Court of Appeals for the Fifth Circuit considered an identical fact pattern — Miller was erroneously stopped for having a turn signal on without changing lanes — and rejected the application of the good faith exception based on the arresting officer’s good faith belief that Miller had violated the law. The court noted that regardless of what the arresting officer’s subjective intent was in making the traffic stop, “legal justification [for the stop] must be objectively grounded.” *Id.* at 279. The court of appeals found no basis for concluding that Miller had violated the law. Thus, “no objective basis for probable cause justified the stop * * *.” *Id.*

{¶ 11} The United States Court of Appeals for the Seventh Circuit reached a similar conclusion in a case where the police mistakenly stopped a driver for displaying a turn signal on a road with a 90-degree turn. Citing to *Miller*, the Seventh Circuit stated:

appropriate turn signal, not a driver who signals but does not make a turn.

{¶ 12} “We agree with the majority of circuits to have considered the issue that a police officer’s mistake of law cannot support probable cause to conduct a stop. Probable cause only exists when an officer has a ‘reasonable’ belief that a law has been broken. [*United States v. Muriel* [(C.A.7, 2005)], 418 F.3d [720,] at 724. Law enforcement officials have a certain degree of leeway to conduct searches and seizures, but ‘the flip side of that leeway is that the legal justification must be objectively grounded.’ *Miller*, 146 F.3d at 279. An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law.” *United States v. McDonald* (C.A.7, 2006), 453 F.3d 958, 961.²

{¶ 13} The state concedes that the arresting officers made a mistake of law by concluding that Fears violated Cleveland Codified Ordinances 431.14. Whether they did so in good faith is immaterial. We therefore conclude that the officers’ mistake of law regarding Fears’s use of a turn signal without turning meant that the officers lacked a reasonable, articulable suspicion for the stop. It follows that the court erred by denying Fears’s motion to suppress evidence.

²We recognize that both *Miller* and *McDonald* refer to “probable cause” to support the traffic stops, not the “reasonable, articulable suspicion” standard we employ. Nevertheless, the controlling point of law in each case — that a police officer’s mistake of law could not justify a traffic stop — is consistent with our holding even under the higher standard that we reject.

{¶ 14} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

—
MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR